

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: August 3, 2023

Mailed: August 4, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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TF Intellectual Property Pty Ltd.

v.

Kenneth Thomas

—
Opposition No. 91270193
—

Michael J. Kosma of Sherman & Howard L.L.C.,
for TF Intellectual Property Pty Ltd.

Bernie Lawrence-Watkins and Akil Dan-Fodio of B. Lawrence Watkins &
Associates, P.C. for Kenneth Thomas.

—
Before Bergsman, Allard, and Cohen,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Kenneth Thomas (“Applicant”) seeks registration on the Principal Register of the
mark KULTURE KINGS & QUEENS (in standard characters) for

Entertainment services in the nature of development, creation, production, distribution, and post-production of documentaries about the history and ongoing impact of urban and hip hop culture; Entertainment services in the nature of production of documentaries about the history and ongoing impact of urban and hip hop culture; Entertainment media production services for motion pictures, television and Internet; Film and video film production; Film distribution; Entertainment services, namely, displaying a series of films; Multimedia

entertainment services in the nature of development, production and post-production services in the fields of video and films, in International Class 41.¹

Applicant disclaims the exclusive right to use the word “Culture.”

TF Intellectual Property Pty Ltd. (“Opposer”) filed a Notice of Opposition against the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Opposer claimed ownership of one registered mark and three pending applications that registered during the proceeding for CULTURE KINGS (standard characters) and one application that registered during the proceeding for C CULTURE KINGS and design. We list below the registrations and applications for CULTURE KINGS in standard characters:

- Registration No. 4801658 for the goods and services listed below:

Clothing and clothing accessories, namely, shirts, trousers, skirts, dresses, suits, underwear, coats, dressing gowns, headbands, neckties, hosiery, socks, jackets, knitwear, namely, sweaters and jumpers, mittens, pyjamas [sic], bathrobes, scarfs, shawls, swimsuits, belts, jeans, footwear, headgear, namely, berets, caps, hats, bandannas, in International Class 25;

Advertising services; Advertising by mail order; Advertising services provided over the internet; Advertising commercial information services provided by access to a computer database; Arranging exhibitions for advertising purposes; Online advertising on a computer network; Promotional marketing services using audiovisual media; Advertising and promotional Services; Retail store services featuring streetwear clothing and accessories; Retail and wholesale department stores services in the field of consumer goods and equipment for domestic use; Retail store services via global computer

¹ Application Serial No. 90343860 was filed on November 25, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s bona fide intention to use the mark in commerce.

networks featuring streetwear clothing and accessories; Retail mail and telephone order services featuring streetwear clothing and accessories; Marketing services, in International Class 35;²

- Serial No. 90369944 (Registration No. 6868691) for the goods listed below:

Fashion masks being sanitary for protection against viral infection; protective face masks being sanitary that cover the nose and mouth to prevent disease, in International Class 10; and

Face cloths of textile; textile fabrics for the manufacture of clothing; cotton fabrics; fabric, specifically denim fabric, linen fabric, wool fabric, leather fabric for textile use, acrylic fabric, cotton fabric, polyester fabric, nylon fabric, cashmere fabric, silk fabric, nylon fabric, rayon fabric, spandex fabric for use in the manufacture of clothing; fabrics made from synthetic thread, in International Class 24;³

- Serial No. 79307360 (Registration No. 6648912) for goods listed below:

Bags for shaving kits sold empty; bags for sports; bags for toiletry kits sold empty; bags for transport of clothes; bags for use in sports for carrying sports clothing; bags made of imitation leather; bags made of leather; beach bags; belt bags; book bags; casual bags, namely, carry all bags; clutch bags; cosmetic bags sold empty, not fitted; evening bags; garment bags for travel; hat bags; jewellery [sic] bags sold empty; leather bags; make-up bags sold empty; net bags for shopping; overnight bags; portable bags, namely, luggage; shoe bags for travel; reusable shopping bags; shoulder bags; sling bags; tote bags; travel bags; waist bags; luggage, namely, weekend bags; luggage; luggage tags; chain mesh purses; clutch purses; coin purses; cosmetic purses sold empty, not fitted; evening purses; leather purses; purses; wallets, namely, business card holders; credit card cases; leather wallets; pocket wallets; key cases; make-up cases

² Registered September 1, 2015; Sections 71 and 15 Declaration accepted and acknowledged.

³ Registered October 11, 2022, based on an application filed December 9, 2020, under Sections 1(a) and 44(d) of the Trademark Act, 15 U.S.C. §§ 1051(a) and 1126(d).

sold empty; boxes of leather or leather board, in International Class 18; and

Bags specially adapted for carrying sporting equipment; gloves made specifically for use in playing sports, namely, boxing gloves, mixed martial arts gloves, and baseball gloves; protective covers for sporting articles, namely, fitted protective covers specially adapted for sports equipment, namely, basketball shoes cases, baseball cap covers, and sport bottle covers; protective padding for playing basketball, boxing, baseball; protectors for the knees, namely, shin guards, for use when participating in the sport of cricket; protectors for the knees, namely, knee pads, for use when riding bicycles; protectors for the knees, namely, knee pads, for use when skateboarding; punching bags; sport balls; wrist bands for use in playing sports; balls for games; boxing gloves; apparatus for games, namely, training mats, backboards for basketball, basketball nets, game console controllers; gloves for games, namely, boxing; pumps specially adapted for use with balls for games; men's athletic supporters; nets for sports; weight lifting belts; toy figures; video game machines; yoga swings, in International Class 28;⁴ and

- Serial No. 79303725 (Registration No. 6564801) for the goods listed below:

Articles of jewellery [sic], namely, bracelets; cases adapted to contain items of jewellery; chains being jewellery [sic]; charms for jewellery [sic]; ear ornaments in the nature of jewellery [sic]; gold jewellery [sic]; gold thread being jewellery [sic]; jewellery [sic]; jewellery [sic] fashioned from non-precious metals; jewellery [sic] fashioned of cultured pearls; jewellery [sic] fashioned of precious metals; jewellery [sic] fashioned of semi-precious stones; jewellery [sic] made from gold; jewellery [sic] made from silver; jewellery [sic] made of bronze; jewellery [sic] made of crystal; jewellery [sic] made of glass; jewellery [sic] made of non-precious metal; jewellery [sic] stones; jewellery [sic] watches; neck chains being jewellery [sic]; pendants being jewellery [sic]; pewter jewellery [sic]; precious jewellery [sic]; ring bands being jewellery [sic]; rings being jewellery [sic]; sterling silver jewellery [sic]; trinkets being jewellery

⁴ Registered February 22, 2022, based on an application filed February 28, 2021, under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a).

[sic]; bands for watches; bracelets and watches combined; bracelets for watches; fitted cases for watches; cases of precious metals for watches; chronographs being watches; digital watches with automatic timers; electrically operated movements for watches; electronic watches; mechanical watches with automatic winding; mechanical watches with manual winding; metal watch bands; ornaments of precious metals incorporating watches; pendant watches; pendants for watch chains; pocket watches; presentation boxes for watches; quartz movements for watches; quartz watches; sports watches; stop watches; watch bands; watch chains; watches made of gold; watches made of plated gold; watches made of precious metals; watches made of rolled gold, in International Class 14.⁵

We reproduce below the C CULTURE KINGS and design mark registered for “face cloths of textile; textile fabrics for the manufacture of clothing; cotton fabrics; fabric, specifically denim fabric, linen fabric, wool fabric, leather fabric for textile use, acrylic fabric, cotton fabric, polyester fabric, nylon fabric, cashmere fabric, silk fabric, nylon fabric, rayon fabric, spandex fabric for use in the manufacture of clothing; fabrics made from synthetic thread,” in International Class 24:⁶



In the registration, Opposer describes the mark as follows:

⁵ Registered November 23, 2021, based on an application filed November 18, 2020, under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a).

⁶ Registration No. 6861945 registered October 4, 2022, based on application Serial No. 90370048 filed December 9, 2020, under Sections 1(a) and 44(e) of the Trademark Act, 15 U.S.C. §§ 1051(a) and 1126(e).

See the discussion below regarding the child application Serial No. 90977178 registered as Registration No. 6863140 on October 4, 2022, in five other International Classes.

The mark consists of the letter “c” surrounded by two branches with a crown on top separating the words “culture and kings.”

In his Amended Answer, Applicant admitted some allegations (as discussed below) but denied the remaining salient allegations of the Notice of Opposition. In his Amended Answer, Applicant asserted an affirmative defense,⁷ which is not a true affirmative defense but rather an amplification of his denial, and is treated as such.

I. Preliminary Issues

Before proceeding to the merits of Opposer’s likelihood of confusion claim, we address several evidentiary matters.

A. Opposer’s common law use of CULTURE KINGS in connection with entertainment services

In its Notice of Opposition, Opposer attempts to allege common law use of its marks for services other than the activities listed in its pleaded registration and applications.

4. Opposer’s goods ... include, but are not limited to, clothing, clothing accessories, clothing fashion consulting services, advertising, marketing and promotional services, retail stores services, barber shop services, jewellery [sic], watches, watch accessories, luggage and luggage accessories, articles of sports apparatus, and face cloth masks (“Opposer’s Goods”).

5. Opposer’s services ... include, but are not limited to, advertising, promotional, and marketing services, advertising by mail order, advertising services provided over the internet, promotional marketing services using audiovisual media, retail store services via global computer networks featuring streetwear clothing and accessories

⁷ Amended Answer (5 TTABVUE 2).

“Opposer’s Services,” collectively with Opposer’s Goods, “Opposer’s Goods and Services”).⁸

Applicant, in his Amended Answer “admits the allegations contained in Paragraph(s) [4 and 5] of Opposer’s Opposition.”⁹

Despite having not expressly pleaded common law use of its CULTURE KINGS mark in connection with entertainment services, Opposer, in its brief, argues that it provides entertainment services identified by its CULTURE KINGS mark.

Applicant’s services and Culture Kings’ goods and services are closely related because both Applicant and Culture Kings provide entertainment content in the form of videos related to musicians, namely, hip-hop and rap.

Culture Kings provides entertainment services under the CULTURE KINGS Marks. Culture Kings has posted and continues to post video content about streetwear, music, fashion, and pop culture on the video-sharing platforms YouTube, TikTok, Snapchat, and Instagram. The CULTURE KINGS Marks are advertised along with goods and services highlighting urban and hip hop culture. Music is an integral part of the foundation on which the CULTURE KINGS brand was built, and is frequently central to advertising material. As noted above, famous rappers and hip-hop music artists are known to wear CULTURE KINGS clothing and attend highly publicized store visits. These visits are then uploaded to the CULTURE KINGS YouTube channel. In addition, Culture Kings publishes hundreds of videos to its YouTube channel which reflect the history and ongoing impact of streetwear, hip-hop, and urban society.¹⁰

⁸ Notice of Opposition ¶¶ 4 and 5 (1 TTABVUE 11-12).

When we cite to the record, we refer to TTABVUE, the Board’s docketing system, by docket entry number and page number (e.g., 9 TTABVUE 43).

⁹ Amended Answer ¶¶ 4 and 5 (5 TTABVUE 3).

¹⁰ Opposer’s Brief, p. 23 (13 TTABVUE 28).

Applicant, in his brief, did not object to Opposer's arguments based on common law use of its CULTURE KINGS mark in connection with entertainment services as not having been pled and, in fact, substantively addressed Opposer's contentions.

Furthermore, since its founding in 2008, nothing in the record suggests that the Culture Kings marks have ever been used in connection with the development, creation, production, distribution, and post-production of documentaries and film in IC 41. "The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration, and not on real-world conditions." *In re Detroit Athletic Co.*, 903 F.3d 1297 (Fed. Cir. 2018). Accordingly, without any record of overlapping or related goods and services used in connection with Applicant and Opposer's relevant marks, the Board must consider the nature of goods and services offered in connection with these respective Marks unrelated, which weighs in favor of Applicant.¹¹

In view of Applicant's admissions in his Amended Answer that Opposer's services encompass activities beyond the services listed in Opposer's pleaded applications and registration] and Applicant's substantive arguments addressing Opposer's contention that Opposer provides entertainment services identified by its CULTURE KINGS mark, we find that Opposer's use of its mark CULTURE KINGS for entertainment services was tried by implied consent and the Notice of Opposition is deemed amended to conform with the evidence. Fed. R. Civ. P. 15(b)(2) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time,

¹¹ Applicant's Brief, p. 18 (14 TTABVUE 19).

even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.”).

B. Applicant’s admissions regarding likelihood of confusion

In response to Opposer’s requests for admission, Applicant admitted that there is a likelihood of confusion.

Request for Admission No. 22: Admit there is a likelihood of confusion between Applicant’s Mark and Opposer’s Mark.

Response: Applicant admits the allegation contained in Request No. 22.

Request for Admission No. 23: Admit there is a likelihood of confusion between Applicant’s Goods and Services and Opposer’s Goods and Services.

Response: Applicant admits the allegation contained in Request No. 23.¹²

Applicant, in his brief, moves, in essence, for the withdrawal of his admissions to Request Nos. 22 and 23. *See* Fed. R. Civ. P. 36(b) (“[T]he court may permit withdrawal or amendment [of an admission] if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.”).

Applicant, by way of counsel, acknowledges a clerical error in its [sic] responses to Opposer’s Request for Admissions Nos. 22 and 23. (CK0014, Response to Request for Admission No. 22, at 6.). Applicant erroneously entered “admits” instead of “denies” in its [sic] response to both requests. The erroneous responses to the aforementioned admission requests clearly contradict Applicant’s legal position in which his actual intent is expressed within his

¹² 9 TTABVUE 1350.

Answer and Amended Answer to this ongoing proceeding, and further implied by Applicant and counsel's devotion of time, effort, and resources in defending Applicant in this opposition proceeding initiated by Opposer. Furthermore, determining whether there is a likelihood of confusion between Applicant and Opposer's marks and their goods and services is a legal question and issue to be determined by Trademark Trial and Appeal Board.¹³

Opposer argues, to the contrary, that Applicant's admissions are no mere clerical error, that Applicant failed to file a motion to withdraw the admissions, and that Opposer will be prejudiced by this belated attempt to withdraw the admissions.

Applicant's admission of a likelihood of confusion in their responses to Request for Admissions Nos. 22 and 23 is a significant and substantive acknowledgment made by Applicant, and cannot be simply dismissed as a clerical error. Applicant's attempt to retract the admission (14 TTABVUE at 7) at this advanced stage of the proceeding undermines the reliability and credibility of their legal position, raising questions about the consistency and veracity of their arguments.

... Applicant did not file a motion to withdraw or amend their admission of likelihood of confusion. Therefore, the admission cannot be withdrawn or amended, solidifying the significance and weight of their acknowledgment in this proceeding.

Further, Culture Kings has been prejudiced by the Applicant's belated attempt to rectify the admission, as it was made on June 24, 2022, just one day before the discovery period closed on June 25, 2022. This left Culture Kings with no opportunity to explore this critical admission further during the discovery phase or seek clarification. The trial period has closed, and final briefs are being submitted, leaving no room for further investigation or discovery based on the Applicant's new position. The timing of the Applicant's attempt to retract the admission

¹³ Applicant's Brief, p. 7 (14 TTABVUE 8).

has unfairly deprived Culture Kings of the chance to fully address and rely on this crucial admission.¹⁴

As noted above, Fed. R. Civ. P. 36(b) provides the following:

A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. ... [T]he court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.

We grant Applicant's "request" to withdraw the admissions to Opposer's Request Nos. 22 and 23. First, we construe Applicant's explanation in his brief to be a request or motion to withdraw the admissions. Although Applicant's request/motion to withdraw was not artfully crafted, we will not exalt form over substance.

Second, Opposer's contention that it will be prejudiced by the withdrawal of the admissions stretches credulity. Applicant's admissions expressly contradict Applicant's Amended Answer and Applicant's defense in this matter. Nevertheless, Opposer contends that if the Board allows Applicant to withdraw his admissions – responses Applicant served on Opposer one day before the close of discovery – Opposer would have no opportunity for follow-up discovery to find evidence supporting its likelihood of confusion claim. In other words, Opposer purportedly was caught by surprise when Applicant sought to withdraw his admission that there is a likelihood of confusion leaving Opposer no time to develop its case. In this regard, we note that requests for admission must be served early enough in the discovery period,

¹⁴ Opposer's Reply Brief, p. 2 (16 TTABVUE 6).

as originally set or as may have been reset by the Board, so that responses will be due no later than the close of discovery. Trademark Rule 2.120(a)(3), 37 C.F.R. § 2.120(a)(3). *See also Estudi Moline Dissey, S.L. v. BioUrn Inc.*, 123 USPQ2d 1268, 1270 (TTAB 2017) (discovery must be served “early enough ... so that responses will be due no later than the close of discovery.”).

Opposer’s opposition to Applicant’s request to withdraw his admissions to Opposer’s requests for admission Nos. 22 and 23 position leaves us with three questions:

- Why did Opposer fail to serve its requests for admission early enough in discovery to permit follow-up discovery in the event Applicant denied Opposer’s requests for admission Nos. 22 and 23?;
- What was Opposer doing during discovery that allowed Opposer to be caught by surprise if Applicant denied there is a likelihood of confusion as he did in his Amended Answer?; and
- If Applicant did not make a mistake when he admitted there is a likelihood of confusion, then why is Applicant defending his right to registration?¹⁵

We grant Applicant’s request to withdraw his admissions to Opposer’s requests for admission Nos. 22 and 23 and, in accordance with Applicant’s request in his brief,

¹⁵ At the oral hearing, Opposer’s counsel speculated that perhaps Applicant thought that there was a likelihood of confusion but the third-party evidence permitted registration. The third-party evidence does not trump likelihood of confusion; it is a factor we consider in determining whether there is a likelihood of confusion (e.g., the strength of Opposer’s mark).

we construe Applicant's responses to requests for admission Nos. 22 and 23 as denials.

C. Applicant's purported evidence of third-party use

Applicant, in his brief, presented "a compiled non-exhaustive list of marks, some registered, some up for publication and some new applications that feature the words 'Culture' and/or 'Kings,' in conjunction or individually, used in connection with goods and services within the fashion (typically, street fashion), music, and entertainment industries."¹⁶ Applicant did not introduce copies of the registrations or applications, so there is no evidence of them on record.¹⁷

Opposer, in its reply brief, did not object to the list of registrations and applications on the ground that they were not properly made of record.¹⁸ In fact,

¹⁶ Applicant's Brief, pp. 10-11 (14 TTABVUE 11-12).

¹⁷ A mere list of registrations has no probative value. *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1231-32 (TTAB 1992) ("[T]hird party registrations may be made of record with a notice of reliance filed during the offering party's testimony period, but the notice must be accompanied by legible, soft copies of the registrations themselves ... or the electronic equivalent thereof, i.e., printouts of the registrations from the electronic records of the Patent and Trademark Office's Trademark Automated Search System, known as 'T-Search.'"); *Nat'l Fidelity Life Ins. v. Nat'l Ins. Trust*, 199 USPQ 691, 694 n.5 (TTAB 1978) (list of registrations without goods and services and other relevant information "has no probative value"). See also *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Caserta*, 46 USPQ2d 1088, 1090 n.4 (TTAB 1998) (list of third-party registered marks from an unidentified source submitted with request for reconsideration, and objected to by examining attorney, not considered); *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974).

Third-party applications have no probative value other than as evidence that the applications were filed; they are not evidence of use of the mark. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992); *Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 62, 65 n.5 (TTAB 1981).

¹⁸ Opposer's Reply Brief, p. 5 (16 TTABVUE 9).

Opposer addressed the probative value or lack thereof of the list of registrations and applications.¹⁹

We find that Opposer waived any objections it may have had to the list of registrations and applications presented in Applicant's brief. We consider the list of registrations and applications for whatever probative value it may have.

D. Opposer's pleaded applications that registered during this proceeding

As noted above, Opposer pleaded ownership of four pending applications that registered during this proceeding. While an opposer that pleads ownership of an application must make any subsequently issued registration of record, it does not have to amend its notice of opposition prior to doing so. The pleading of the application provides sufficient notice to the applicant that the opposer intends to rely on the resulting registration for its likelihood of confusion claim. *See Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1106 n.6 (TTAB 2016) (citing *UMG Recordings, Inc. v. O'Rourke*, 92 USPQ2d 1042, 1045 n.12 (TTAB 2009)). In this regard, the Board does not take judicial notice of either third-party registrations or a party's own registrations insofar as the Trademark Rules of Practice specify how to make such registrations of record in an inter partes proceeding. Trademark Rule 2.122(d) and (e), 37 C.F.R. § 2.122(d) and (e); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.12; *Flame & Wax, Inc. v. Laguna Candles, LLC*, 2022 USPQ2d 714, at *31 n.57 (TTAB 2022) ("The Board's well-established practice is not

¹⁹ *Id.* at pp. 5-6 (16 TTABVUE 9-10).

to take judicial notice of USPTO records.”); *Cities Serv. Co. v. WMF of Am., Inc.*, 199 USPQ 493 (TTAB 1978) (judicial notice of third-party registrations may not be taken where no copies thereof are submitted).

As discussed above, Opposer’s Application Serial No. 90370048 registered as Registration No. 6868691 for the mark C CULTURE KINGS and design and was filed on December 9, 2020 (prior to the filing of the opposition), in six International Classes:

- Class 9 for “protective masks”;
- Class 14 for jewelry;
- Class 24 for “face cloths of textile; apparel fabrics; cotton fabrics; fabric; fabrics made from synthetic threads”;
- Class 25 for clothing; and
- Class 35 for advertising services and a variety of retail sales services.

During the prosecution of that application, Opposer filed a request to divide the application into an application in International Class 24 and an application in International Classes 9, 10, 14, 25, and 35. The USPTO granted Opposer’s request to divide. Application Serial No. 90370048 (original application) (now Registration No. 6861945) contains the goods in International Class 24.

The USPTO created Serial No. 90977178 for the goods and services in International Classes 9, 10, 14, 25, and 35. That application registered on October 4, 2022, for the goods and services in International Classes 10, 14, 25, and 35.²⁰

²⁰ Registration No. 6863140.

With this in mind, we note the following:

- Opposer introduced copies of Registration Nos. 6648912²¹ and 6564801²² for the mark CULTURE KINGS (in standard characters) printed from the USPTO Trademark Status and Document Retrieval (TSDR) system showing the current status of and title to the registrations; and

- Opposer introduced copies of the TSDR printouts of Serial No. 90369944 (Registration No. 6868691) for the mark CULTURE KINGS (in standard characters)²³ and Serial Nos. 90370048 (Registration No. 6861945)²⁴ and 90977178 (Registration No. 6863140) for the mark C CULTURE KINGS and design that do **NOT** show that the applications have registered.²⁵

In sum, Registration Nos. 4801658, 6648912 and 6564801 are of record. On the other hand, Registration No. 6868691 (Serial No. 90369944), Registration No. 6861945 (Serial No. 90370048), and Registration No. 6863140 (Serial No. 90977178) have **NOT** been made of record because the USPTO electronic database records Opposer introduced do not show that those applications registered.

Therefore, we will consider Registration Nos. 4801658, 6648912 and 6564801 in our likelihood of confusion analysis.

²¹ 9 TTABVUE 626 (Serial No. 79307360).

²² 9 TTABVUE 557 (Serial No. 79303725).

²³ 9 TTABVUE 1120. The status of the application on the TSDR printout is “Application has been published for opposition.”

²⁴ 9 TTABVUE 697-704. The status of the application on the TSDR printout is “Application has been published for opposition.”

²⁵ Opposer did not introduce into the record a copy of Serial No. 90977178 (Registration No. 6863140).

E. Opposer's multi-media exhibit

Opposer sought to introduce “Applicant’s unreleased trailer for its KULTURE KINGS & QUEENS documentary series” via notice of reliance.²⁶ An “unreleased trailer” for a “documentary series” is not the type of evidence that may be introduced through a notice of reliance. Normally, exhibits filed under a notice of reliance consist of pleaded registrations and pleaded applications, printed publications, official records, Internet materials, an adverse party’s written disclosures and certain written discovery responses, and discovery depositions of an adverse party. *See generally* Trademark Rules 2.122(d)(2), 2.122(e)(1), and 2.120(k), 37 C.F.R. §§ 2.122(d)(2), 2.122(e)(1), and 2.120(k). *See also* *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1037-38 n.12 (TTAB 2018) (listing materials normally filed under notice of reliance). Accordingly, we will not consider the unreleased trailer.

II. The Record

The record includes the pleadings, and under Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s application.²⁷ In addition, Opposer’s pleaded Registration No. 4801658 is of record because Opposer attached to its Notice of

²⁶ 9 TTABVUE 5.

²⁷ Therefore, it was not necessary for Opposer to introduce a copy of the TSDR printout and copy of the prosecution history through a notice of reliance. 9 TTABVUE 1355-79. Nor was it necessary for Applicant to introduce a copy of his application printed from the USPTO TSDR database through a notice of reliance. 12 TTABVUE 50-52.

Opposition a copy of that registration printed from the USPTO TESS (Trademark Electronic Search System) database showing its current status and title. Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1). The parties also introduced the testimony and evidence listed below:

A. Opposer’s testimony and evidence²⁸

1. Testimony declaration of Simon Beard, “founder and current CEO of Culture Kings, a retail streetwear brand, and its companies including [Opposer]”;²⁹
2. Notice of reliance on a copy of Registration No. 6564801 (Serial No. 79303725) for the mark CULTUTE KINGS (standard characters) printed from the USPTO TSDR database showing the current status of and title to the registration and a copy of the prosecution history;³⁰

²⁸ Opposer filed all of its testimony and evidence in one “notice of reliance” comprising 1,418 pages. Practitioners should be aware of certain system limitations in the ESTTA database. The size limit for each file attached is 6 MB, and the aggregate of all attached files for a single ESTTA transmission may not exceed 53 MB. However, because very large files degrade the performance of the Board’s electronic file system, filers should limit each ESTTA submission to no more than an aggregate (all attached files combined) so as not to exceed the limitations. If a single submission, e.g., a single testimonial transcript or notice of reliance, will exceed the limitations, it should be broken into two or more submissions, in logical segments, filed consecutively. *See* TBMP § 110.02(c) (2023).

In addition to the large file, because Opposer did not use TTABVUE citations to identify testimony and evidence, it was difficult to navigate Opposer’s testimony and evidence. To allow readers to easily locate materials in the record, the parties should cite to the evidence in the trial record by referencing the TTABVUE entry and page number. *See RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018) (Board prefers citation to the TTABVUE record), *aff’d*, 377 F. Supp. 3d 588 (E.D. Va. 2019), *aff’d*, 986 F.3d 361, 2021 USPQ2d 81 (4th Cir. 2021); *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014) (citation to the Board’s TTABVUE docket electronic database by the entry and page number (e.g., 1 TTABVUE 2) recommended).

²⁹ 9 TTABVUE 8-394.

³⁰ 9 TTABVUE 557-623,

3. Notice of reliance on a copy of Registration No. 6648912 (Serial No. 79307360) for the mark CULTURE KINGS (standard characters) printed from the USPTO TSDR database showing the current status of and title to the registration and a copy of the prosecution history;³¹
4. Notice of reliance on a copy of Serial No. 90370048 for the mark C CULTURE KINGS and designs printed from the USPTO TSDR database showing the current status of and title to the application and a copy of the prosecution history;³²
5. Notice of reliance on a copy of Serial No. 90977178 for the mark C CULTURE KINGS and design printed from the USPTO TSDR database showing the current status of and title to the application and a copy of the prosecution history;³³
6. Notice of reliance on a copy of Serial No. 90369944 for the mark CULTURE KINGS (standard characters) printed from the USPTO TSDR database showing the current status of and title to the application and a copy of the prosecution history;³⁴
7. Notice of reliance on a copy of Serial No. 97443884 for the mark CULTURE KINGS (standard characters) printed from the USPTO TSDR database showing the current status of and title to the application;³⁵
8. Notice of reliance on Applicant's responses to Opposer's first set of interrogatories;³⁶

³¹ 9 TTABVUE 626-695.

³² 9 TTABVUE 697-906.

³³ 9 TTABVUE 908-1118. This is the child application of Serial No. 90370048. This application has been published for opposition.

³⁴ 9 TTABVUE 1120-1269.

³⁵ 9 TTABVUE 1271-1278. Opposer did not plead ownership of this application. Opposer filed this application on June 6, 2022, just prior to the June 25, 2022 scheduled close discovery. The status of the application is "New application awaiting assignment to the examining attorney." The application was filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Opposer's bona fide intent to use the mark for entertainment services in International Class 41.

³⁶ 9 TTABVUE 1293-1298. Applicant also introduced a copy of his responses to Opposer's first and second set of interrogatories via Applicant's own notice of reliance. 12 TTABVUE 38-48. Ordinarily, an answer to an interrogatory may be submitted and made part of the record by only the inquiring party. Trademark Rule 2.120(k)(5), 37 C.F.R. § 2.120(k)(5) ("Written disclosures, an answer to an interrogatory, or an admission to a request for admission, may

9. Notice of reliance on Applicant's responses to Opposer's second set of interrogatories;³⁷
10. Notice of reliance on Applicant's responses to Opposer's first request for admission;³⁸ and
11. Notice of reliance on Applicant's "Supplemental Responses to Opposer's First Set of Requests for Production of Documents and Things."³⁹

A. Applicant's evidence

1. Notice of reliance on Opposer's responses to Applicant's first set of interrogatories;⁴⁰ and
2. Notice of reliance on an excerpt from Opposer's website (culturekings.com).⁴¹

be submitted and made part of the record only by the receiving or inquiring party."). However, because Opposer introduced those documents, Applicant may rely on them. Trademark Rule 2.122(a), 37 C.F.R. § 2.122(a) ("When evidence has been made of record by one party in accordance with these rules, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence.").

³⁷ 9 TTABVUE 1305-1308.

³⁸ 9 TTABVUE 1345-1352. A party may introduce only an admission to a request for admission through a notice of reliance. Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i). A denial or statement that the responding party cannot respond to the request does not establish the truth or falsity of the assertion, but rather leaves the matter for proof at trial. *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1957 n.10 (TTAB 2008) (denials to requests for admission inadmissible because "unlike an admission (or a failure to respond which constitutes an admission), the denial of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial."). As such, we consider only the admissions to the requests for admission.

³⁹ 9 TTABVUE 1400-1418. Applicant's responses to requests for production of documents are admissible only to prove that no documents exist. *See McGowen Precision Barrels, LLC v. Proof Research, Inc.*, 2021 USPQ2d 559, at *5 n.6 (TTAB 2021) (written responses to requests for production of documents introduced through a notice of reliance are admissible solely for the purpose of showing that a party has stated that there are no responsive documents); *City Nat'l Bank v. OPGI Mgm't GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013) (same); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 n.7 (TTAB 2012) (same).

⁴⁰ 12 TTABVUE 6-36.

⁴¹ 12 TTABVUE 54-63.

III. Entitlement to a statutory cause of action

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, is an element of the plaintiff’s case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014)); *Corcamore*, 2020 USPQ2d 11277, at *4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982); *Spanishtown Enters.*, 2020 USPQ2d 11388, at *1 (TTAB 2020).

Opposer’s use and registration of its CULTURE KINGS marks establish that it is entitled to oppose the registration of Applicant’s mark.⁴² *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations

⁴² Beard Testimony Decl. ¶¶ 10-15 (9 TTABVUE 10-11); 1 TTABVUE 17-18; 9 TTABVUE 557 and 626.

“suffice to establish ... direct commercial interest”; a belief in likely damage can be shown by establishing a direct commercial interest); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6 (TTAB 2020) (pleaded registrations establish statutory entitlement to bring opposition); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that plaintiff uses its mark “is sufficient to support [plaintiff’s] allegations of a reasonable belief that it would be damaged ...”).

Applicant, in his brief, does not challenge Opposer’s entitlement to a statutory cause of action.

We find that Opposer has established its entitlement to a statutory cause of action.

IV. Section 2(d) – Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its pleaded mark and that use of Applicant’s mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Opposer’s goods or services. *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1848.

A. Priority

The same pleaded registrations, which Applicant has not counterclaimed to cancel, establish that priority is not an issue as to the marks and the goods and services covered by the registrations. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d. 1400, 182 USPQ 108, 110 (CCPA 1974)).

Even though the underlying applications for Registration Nos. 6648912 and 6564801 were filed (February 22, 2022 and November 23, 2021 respectively) after Applicant's application (November 25, 2020) at issue in this proceeding, we consider these registrations in our likelihood of confusion analysis. *King Candy*, 182 USPQ at 110. As the court explained:

In an opposition, the board must consider existing registrations of subsequent-user opposers, because (1) the statute, 15 U.S.C. §§ 1051-1127, requires such consideration; (2) the basic question in an opposition is applicant's right to register (not merely, as the board says, whether the opposer "will be damaged"); (3) in determining applicant's right to register, the entire statute, including *Section 2(d)*, must be considered; (4) *Section 2(d)* says an applicant can register, *unless* his mark is likely to cause confusion with a mark "*registered in the Patent Office or * * * previously used * * **" (emphasis added); (5) the board's requirement that the registrant-opposer also be a prior user impermissively negates the statutory distinction ("or") in *Section 2(d)* between a registered mark and a previously-used-but-unregistered mark, would permit simultaneous registration of the same mark for the same goods to different parties, and disregards--in effect conflicts with--Patent Office Rule 2.106(b), which forbids any attack (other than a request for cancellation) on the validity of a registration in an opposition; (6) the board's position is unsupported by either statutory or definitive decisional authority; and (7) an

opposer who, in the language of *Section 13*, “believes he would be damaged,” may in fact suffer damage to his *registration*, (Sec. 7(b)), if the applicant’s mark is registered.

King Candy, 182 USPQ at 110. *See also Nkanginieme v. Appleton*, 2023 USPQ2d 277, *9 (TTAB 2023) (“In short, notwithstanding an applicant’s assertion of earlier filing or actual use dates, unless there is a counterclaim against the opposer’s pleaded and proven registration, priority is not at issue in a likelihood of confusion dispute.”).

In addition, Simon Beard testified that “[t]he CULTURE KINGS Marks have been used in US commerce in connection with the sale and promotion of apparel, streetwear, and accessories relating to music, sport, and fashion since at least 2014.”⁴³ “The CULTURE KINGS Marks are used in association with apparel such as clothing, footwear, jewelry, watches, and accessories, as well as in association with collectible figures, books, water bottles, sport accessories, and stickers.”⁴⁴ *See Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965) (“Oral testimony, if sufficiently probative, is normally satisfactory to establish priority of use in a trademark proceeding.”); *Nat’l Blank Book Co. v. Leather Crafted Prods., Inc.*, 218 USPQ 826, 828 (TTAB 1993) (oral testimony may be sufficient to prove the first use of a party’s mark when it is based on personal knowledge, it is clear and convincing, and it has not be contradicted); *Liquacon Corp. v. Browning-Ferris Indus., Inc.*, 203 USPQ 305, 316 (TTAB 1979) (oral testimony may be sufficient to establish both prior use and continuous use when the testimony is

⁴³ Beard Testimony Decl. ¶ 10 (9 TTABVUE 10).

⁴⁴ *Id.* at ¶ 15 (9 TTABVUE 11).

proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value). Beard's testimony is clear, consistent, convincing, and uncontradicted.

We find that Opposer has established its priority for the goods and services listed below:

Articles of jewellery [sic], namely, bracelets; cases adapted to contain items of jewellery; chains being jewellery [sic]; charms for jewellery [sic]; ear ornaments in the nature of jewellery [sic]; gold jewellery [sic]; gold thread being jewellery [sic]; jewellery [sic]; jewellery [sic] fashioned from non-precious metals; jewellery [sic] fashioned of cultured pearls; jewellery [sic] fashioned of precious metals; jewellery [sic] fashioned of semi-precious stones; jewellery [sic] made from gold; jewellery [sic] made from silver; jewellery [sic] made of bronze; jewellery [sic] made of crystal; jewellery [sic] made of glass; jewellery [sic] made of non-precious metal; jewellery [sic] stones; jewellery [sic] watches; neck chains being jewellery [sic]; pendants being jewellery [sic]; pewter jewellery [sic]; precious jewellery [sic]; ring bands being jewellery [sic]; rings being jewellery [sic]; sterling silver jewellery [sic]; trinkets being jewellery [sic]; bands for watches; bracelets and watches combined; bracelets for watches; fitted cases for watches; cases of precious metals for watches; chronographs being watches; digital watches with automatic timers; electrically operated movements for watches; electronic watches; mechanical watches with automatic winding; mechanical watches with manual winding; metal watch bands; ornaments of precious metals incorporating watches; pendant watches; pendants for watch chains; pocket watches; presentation boxes for watches; quartz movements for watches; quartz watches; sports watches; stop watches; watch bands; watch chains; watches made of gold; watches made of plated gold; watches made of precious metals; watches made of rolled gold, in International Class 14;

Bags for shaving kits sold empty; bags for sports; bags for toiletry kits sold empty; bags for transport of clothes; bags for use in sports for carrying sports clothing; bags made of imitation leather; bags made of leather; beach bags; belt bags; book bags; casual bags, namely, carry all bags; clutch bags; cosmetic bags sold empty, not fitted; evening bags; garment bags for travel; hat bags; jewellery [sic] bags sold empty; leather bags; make-up bags sold empty; net bags for shopping; overnight bags; portable bags, namely, luggage; shoe bags for travel; reusable shopping bags; shoulder bags; sling bags; tote bags; travel bags; waist bags; luggage, namely, weekend bags; luggage; luggage tags; chain mesh purses; clutch purses; coin purses; cosmetic purses sold empty, not fitted; evening purses; leather purses; purses; wallets, namely, business card holders; credit card cases; leather wallets; pocket wallets; key cases; make-up cases sold empty; boxes of leather or leather board, in International Class 18;

Clothing and clothing accessories, namely, shirts, trousers, skirts, dresses, suits, underwear, coats, dressing gowns, headbands, neckties, hosiery, socks, jackets, knitwear, namely, sweaters and jumpers, mittens, pyjamas [sic], bathrobes, scarfs, shawls, swimsuits, belts, jeans, footwear, headgear, namely, berets, caps, hats, bandannas, in International Class 25;

Bags specially adapted for carrying sporting equipment; gloves made specifically for use in playing sports, namely, boxing gloves, mixed martial arts gloves, and baseball gloves; protective covers for sporting articles, namely, fitted protective covers specially adapted for sports equipment, namely, basketball shoes cases, baseball cap covers, and sport bottle covers; protective padding for playing basketball, boxing, baseball; protectors for the knees, namely, shin guards, for use when participating in the sport of cricket; protectors for the knees, namely, knee pads, for use when riding bicycles; protectors for the knees, namely, knee pads, for use when skateboarding; punching bags; sport balls; wrist bands for use in playing sports; balls for games; boxing gloves; apparatus for games, namely, training mats, backboards for basketball, basketball nets, game console controllers; gloves for games, namely, boxing; pumps specially adapted for use with balls for games; men's athletic supporters; nets for sports;

weight lifting belts; toy figures; video game machines; yoga swings, in International Class 28; and

Advertising services; Advertising by mail order; Advertising services provided over the internet; Advertising commercial information services provided by access to a computer database; Arranging exhibitions for advertising purposes; Online advertising on a computer network; Promotional marketing services using audiovisual media; Advertising and promotional Services; Retail store services featuring streetwear clothing and accessories; Retail and wholesale department stores services in the field of consumer goods and equipment for domestic use; Retail store services via global computer networks featuring streetwear clothing and accessories; Retail mail and telephone order services featuring streetwear clothing and accessories; Marketing services, in International Class 35.

Beard did not testify when Opposer began rendering entertainment services and, therefore, Opposer failed to prove priority as to those services.⁴⁵ Although Beard

⁴⁵ Beard testified that Opposer “has a history of posting entertainment videos online. The first video on the CULTURE KINGS YouTube channel was posted December 29, 2011.” Beard Testimony Decl. ¶ 24 (9 TTABVUE 14). Opposer cited a link to corroborate the first video. An Internet link does not make the evidence of record. *See Chutter, Inc. v. Great Mgm’t Grp., LLC*, 2021 USPQ2d 1001, at *32 n.67 (TTAB 2021) (article and accompanying video referenced by hyperlink inadmissible), *appeal docketed*, No. 22-1212 (Fed. Cir. 2021); *Int’l Dairy Foods Ass’n v. Interprofession du Gruyère*, 2020 USPQ2d 10892, at *7-8 (TTAB 2020) (nonconforming evidence consisting of Internet materials bearing web addresses without a copy of the corresponding web pages not considered by the Board), *aff’d*, 575 F. Supp. 3d 627 (E.D. Va. 2021), *aff’d*, 61 F.4th 407, 2023 USPQ2d 266 (4th Cir. 2023); *TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.14 (TTAB 2018) (providing an Internet link to an article is insufficient to make the article of record because the information displayed at a link’s Internet address is impermanent; article is of record only because it was submitted as an exhibit to a declaration. “The Board does not accept Internet links as a substitute for submission of a copy of the resulting page.”).

The other videos Beard cited and posted at 9 TTABVUE 228-236 and 269-271 do not show the CULTURE KINGS mark used to identify and distinguish entertainment services. Moreover, it is not clear that posting videos promoting one’s own goods and services is a registrable service. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 130101(a)(ii) (2022) that provides:

To be a service, an activity must be primarily for the benefit of someone other than the applicant. While an advertising agency

testified that Opposer's stores are "globally regarded as a destination and an immersive experience" and "known worldwide for having live DJs, barbershops, a Sharpshooter Challenge ... where customers can win prizes by making basketball shots, ... and a game machine where customers can win prizes called the Holy Grail,"⁴⁶ Opposer's first store in Las Vegas store did not open until December 31, 2022,⁴⁷ after the November 25, 2020, filing date of Applicant's application.

B. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "Whether a likelihood of confusion exists between an applicant's mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors." *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). "In discharging this duty, the thirteen *DuPont* factors 'must be considered' 'when [they]

provides a service when it promotes the goods or services of its clients, a company that promotes the sale of its own goods or services is doing so for its own benefit rather than rendering a service for others.

⁴⁶ Beard Testimony Decl. ¶ 23 (9 TTABVUE 12-14).

⁴⁷ Beard Testimony Decl. ¶ 12 (9 TTABVUE 10-11). Beard testified that Opposer "is also opening a Las Vegas storefront in 2022 in the Forum Shops at Caesars Las Vegas." *Id.*

are of record.” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023) (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record

evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

1. The strength of Opposer’s CULTURE KINGS marks

To determine a mark’s strength, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength, based on its recognition in the marketplace. *See Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength ...”); *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atlantic Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. (March 2023 Update) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”).

The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

Commercial strength may be measured indirectly, by volume of sales and advertising expenditures and factors such as length of use of the mark, widespread critical assessments, notice by independent sources of the goods or services identified by the mark, and general reputation of the goods or services. *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014).

a. Inherent strength

Opposer's CULTURE KINGS mark is registered for jewelry, clothing, a wide variety of bags, including luggage, wallets and purses, sports equipment, advertising and marketing services, and retail store services featuring streetwear clothing and accessories, without any claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). Opposer's CULTURE KINGS mark used in connection with those goods and services is an arbitrary mark and, therefore, inherently or conceptually strong. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a "known word used in an unexpected or uncommon way" and observing that such marks are typically strong). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks); *Ginc UK Ltd.*, 90 USPQ2d at 1479 (completely unique and arbitrary, if not coined, nature of mark in relation to goods entitles the registered mark to a broad scope of protection, and significantly increases the likelihood that the marks, when used in connection with the identical goods would cause confusion).

Applicant argues, in essence, that because there are 11 third-party registrations and six application for marks with the word “Culture” in International Classes 9, 25, 25, 35 and 41, Opposer’s CULTURE KINGS mark is not inherently or conceptually strong inasmuch as Opposer is not the substantially exclusive user of that term.⁴⁸ To corroborate his argument, Applicant introduced the list of third-party registrations and applications discussed above.

Third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Institut Nat. des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations show the sense in which a word is used in ordinary parlance and that a particular term has descriptive significance as applied to certain goods or services); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this limited manner, ‘third party registrations are similar to dictionaries showing how language is generally used.’”) (internal citation omitted.).

However, as indicated above, because Applicant’s list of 11 third-party registrations and six applications does not include any identifications or recitations

⁴⁸ Applicant’s Brief, pp. 10-12 (14 TTABVUE 11-12).

of goods or services, it has little, if any, probative value.⁴⁹ *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”). *See also Key Chem., Inc. v. Kelite Chem. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word ‘KEY’. The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.”).

⁴⁹ We also note that absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). As the Court pointed out in *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967), “the existence of these [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with their use.” Where, as here, the “record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is thus minimal.”

As pointed out in note 15, third-party applications have no probative value other than as evidence that the applications were filed; they are not evidence of use of the mark. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992); *Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 62, 65 n.5 (TTAB 1981).

Finally, only one mark in Applicant's list, KINGDOM CULTURE (Registration No. 6572216) in International Class 41, has both the word "Culture" and a variation of the word "King."

However, unlike cases in which extensive evidence of third-party use and other evidence in the record was found to be "powerful on its face" inasmuch as "a considerable number of third parties use [of] similar marks was shown," *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-5 (Fed. Cir. 2015), Applicant's evidence falls well short of the volume of evidence found convincing in *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) and *Juice Generation*.

Applicant's list of 11 third-party registrations fails to detract from the inherent or conceptual strength of Opposer's CULTURE KINGS mark and, therefore, we find CULTURE KINGS to be inherently strong.

b. Commercial strength

Opposer contends that its CULTURE KINGS mark is famous.

[Opposer's] CULTURE KINGS Marks are well-known and widely publicized. [Opposer] has spent extensive funds and invested significant time to build a global presence and association with music, sport, and fashion for purchasers of all demographics.

... [Opposer] has made CULTURE KINGS a household name.⁵⁰

Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

The commercial strength or fame of a mark rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay*, 73 USPQ2d at 1694). Commercial strength “may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Bose Corp.*, 63 USPQ2ds at 1305 (Fed. Cir. 2002). Other relevant factors include “length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark.” *Coach Servs.*,

⁵⁰ Opposer's Brief, p. 28 (13 TTABVUE 33).

Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012). See also *Omaha Steaks Int'l*, 128 USPQ2d at 1690-91 (unsolicited media attention).

Because of the wide latitude of legal protection we accord a famous mark, and the dominant role fame plays in the likelihood of confusion analysis, Opposer has the duty to clearly prove the fame of its pleaded marks. *Coach Servs.*, 101 USPQ2d at 1720 (citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007)).

Finally, in the likelihood of confusion analysis, “fame ‘varies along a spectrum from very strong to very weak.’” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

With this framework in mind, we turn to Opposer’s evidence of fame/commercial strength listed below:

- Opposer has used the CULTURE KINGS mark in the U.S. “with the sale of and promotion of apparel, streetwear, and accessories relating to music, sport and fashion since at least 2014”;⁵¹
- Opposer sells and advertises its products online and at a brick-and-mortar stores;⁵²

⁵¹ Beard Testimony Decl. ¶ 10 (9 TTABVUE 10).

⁵² *Id.* at ¶ 12 (9 TTABVUE 10).

- “As of September 2022, the goods and services under the CULTURE KINGS Marks are available for purchase and are sold through 8 physical store locations in Australia. [Opposer] is also opening a Las Vegas storefront in 2022 in the Forum Shops at Caesars Las Vegas, and has garnered significant press from SGB Media and Business Wire. (TFIP000791-792; TFIP000964-965 (SBG Media); TFIP000891-894 (Business Wire)).”;⁵³

- Opposer advertises its goods and services through its website (<culturekings.com>), through a blog featuring articles on music, style and sport, through Facebook, Twitter, Instagram, Youtube, TikTok and Pinterest and others, through an app available worldwide downloadable on iOS and Android;⁵⁴

- “[Opposer’s] stores are globally regarded as a destination and an immersive experience. [Opposer] has been at the forefront of providing a one-of-a-kind shopping experience under the CULTURE KINGS brand for fans of music, sport, and fashion (TFIP000909-911). [Opposer’s] stores are known worldwide for having live DJs, barbershops, a Sharpshooter Challenge (TFIP001148-49) where customers can win

⁵³ *Id.* at ¶ 12 (9 TTABVUE 10-11).

⁵⁴ *Id.* at ¶¶ 17-21 (9 TTABVUE 12). Beard provided a table summarizing the followers on its social media accounts. *Id.* at ¶ 22 (9 TTABVUE 13). However, he did not testify as to whether the figures represent U.S. as opposed to worldwide engagement or as to the percentage of U.S. engagement. Foreign use of Opposer’s mark is not relevant to the issues in a Board proceeding. For general rule, see *Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612-13 (TTAB 1991); *Johnson & Johnson v. Salve S.A.*, 183 USPQ 375, 376 (TTAB 1974) (foreign use of mark creates no rights in mark in U.S.). See also *Oland’s Breweries [1971] Ltd. v. Miller Brewing Co.*, 189 USPQ 481, 489 n.2 (TTAB 1975) (use or promotion of a mark confined to a foreign country, including Canada, is immaterial to ownership and registration in U.S.), *aff’d*, *Miller Brewing Co. v. Oland’s Breweries*, 548 F.2d 349, 192 USPQ 266 (CCPA 1976). Because Beard testified that Opposer has eight retail stores in Australia as opposed to one store opening in Las Vegas in 2022, we would be speculating as to the extent of Opposer’s social media followers in the U.S.

prizes by making basketball shots, a luxury space for watches and jewelry called the Vault, and a game machine where customers can win prizes called the Holy Grail.”⁵⁵

- [Opposer’s] stores are also well known for celebrity appearances. The stores are popular with young, cool, and/or streetwear-obsessed celebrities, with the likes of Big Sean, Snoop Dogg, 2 Chainz, Migos, Drake, Justin Bieber, Shaquille O’Neal, and Cristiano Ronaldo making appearances. Videos of the appearances are often posted on YouTube and other social media so fans from around the world can experience the store visits and see what their favorite athletes and musicians purchased. [Opposer’s] exceptional in-store experience has led to a global reputation for excellence as a streetwear brand, and immense online global sales have followed that reputation.”⁵⁶

- Opposer has collaborated with Ice Cube, The Notorious B.I.G., Wu Tang Clan, Justin Bieber, and Migos;⁵⁷

- Opposer has engaged in cross-brand merchandise collaborations with other companies such as Kappa X Culture Kings, Timberland X Culture Kings, Smokers Club X Culture Kings, Champion X Culture Kings, G-Shock X Culture Kings, Culture

⁵⁵ Beard Testimony Decl. ¶ 23 (9 TTABVUE 13-14). *See* the preceding note regarding foreign use of Opposer’s mark.

⁵⁶ *Id.* at ¶ 25 (9 TTABVUE 14). *See* note 48. Because the record shows that Opposer is going to open one store in Las Vegas in 2022, Opposer’s renown for celebrity appearances is not likely based on appearances at stores in the U.S. The record does not indicate how many U.S. Youtube viewers watch those celebrity appearances or whether U.S. consumers perceive Opposer’s “worldwide reputation for excellence as a streetwear brand.” Finally, Opposer’s “immense global sales” do not inform regarding the percentage or extent of those sales in the U.S.

⁵⁷ *Id.* at ¶ 27 (9 TTABVUE 15).

Kings X Sneaker Basel, Modern Warfare X Culture Kings for Call of Duty, Russell Athletics X Culture Kings, and Bravado X Culture Kings;⁵⁸

- Opposer offers “an extensive and curated range” of over 100 leading brands;⁵⁹

and

- Opposer’s CULTURE KINGS brand has garnered U.S. media attention in publications such as BusinessWire, BusinessNews, Inside Retail, Ten Pieces of Eight, Women’s Wear Daily, Honest Brand Reviews, Shopify Plus, Financial Review, Google Ads, and Opposer’s own Wikipedia page.⁶⁰

Opposer’s testimony and evidence regarding its commercial strength is notable for what evidence Opposer did **NOT** introduce. For example,

- There is no testimony or evidence regarding the U.S. revenues derived from goods and services identified by the CULTURE KINGS mark;
- There is no testimony or evidence regarding Opposer’s market share from goods and services identified by the CULTURE KINGS mark;

⁵⁸ *Id.* at 28 (9 TTABVUE 15).

⁵⁹ *Id.* at 30 (9 TTABVUE 16).

⁶⁰ *Id.* at 31 (9 TTABVUE 16). Many of the publications are business publications reporting the purchase of Opposer by a.k.a. Brands and not articles noting the renown of Opposer’s goods and services. *See e.g.*, The BusinessNews article (9 TTABVUE 58) (reports Opposer opening a store in Perth, Australia); The BusinessWire article (9 TTABVUE 60) (a press release reporting Jonathan Yuska’s appointment as Opposer’s president); The Financial Review article (9 TTABVUE 87) and the Forbes article (9 TTABVUE 89) (reporting that the U.S. equity firm a.k.a. Brands acquired Opposer. The articles discuss how a.k.a. Brands wants to bring Opposer’s street brand style to the U.S.); The Inside Retail article (9 TTABVUE 118) (from the New Zealand edition and reporting the opening of Opposer’s store in New Zealand).

- There is no testimony or evidence regarding Opposer’s advertising expenses for goods and services identified by the CULTURE KINGS mark;
- As noted in note 48, Opposer failed to segregate its social media presence into U.S. followers/viewers providing only worldwide figures; and
- Opposer’s purported evidence of unsolicited media attention fails to refer any market renown generated by the CULTURE KINGS mark in the U.S.

In view of the foregoing, we find that CULTURE KINGS falls on the weak end of the spectrum of from very strong to very weak. *See Joseph Phelps Vineyards*, 122 USPQ2d at 1734.

In sum, although Opposer’s CULTURE KINGS mark is commercially weak, because it is inherently strong, it is entitled to a broad scope of protection. *See Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017) (“Opposer’s marks are inherently distinctive and accord them the normal scope of protection to which inherently distinctive marks are entitled.”).

2. The similarity or dissimilarity of the marks

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is

sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *Coors Brewing*, 68 USPQ2d at 1062).

We focus our analysis on Opposer’s CULTURE KINGS mark in standard characters because the design element in Opposer’s mark C CULTURE KINGS and design contain an additional points of difference with Applicant’s mark. That is, if confusion is likely between Opposer’s mark CULTURE KINGS and Applicant’s mark KULTURE KINGS & QUEENS, there is no need for us to consider the likelihood of confusion with Opposer design mark; the standard character mark is a sufficient basis for us to find that the marks are similar. Conversely, if there is no likelihood of confusion between Applicant’s mark and the CULTURE KINGS mark in standard characters, then there would be no likelihood of confusion with the mark with design elements. *See, e.g., North Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d

1217, 1225 (TTAB 2015); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

The term KULTURE KINGS in Applicant's mark KULTURE KINGS & QUEENS constitutes a prominent part of Applicant's mark because it is the first part of the mark. As the Federal Circuit often has said, the lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and so as to play a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Palm Bay Imps.*, 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

KULTURE KINGS is the phonetic equivalent of Opposer's mark CULTURE KINGS differing in spelling only as to a single letter. Slight differences in marks do not normally create dissimilar marks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1741 (TTAB 2014) (AKEA is similar to IKEA); *Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) ("Obviously, the marks LEGO and MEGO are extremely similar in that they differ simply by one letter."); *U.S. Mineral Prods. Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are

substantially similar in appearance and sound.”). *See also Viterra*, 101 USPQ2d at 1912 (upholding the Board’s affirmance of a Section 2(d) refusal to register XCEED for agricultural seed based on a likelihood of confusion with the registered mark X-SEED and design, SEED disclaimed, for identical goods).⁶¹

While KULTURE KINGS and CULTURE KINGS differ only by Applicant’s misspelling of “Culture” by substituting the letter “K” for the letter “C,” Applicant’s mark otherwise incorporates Opposer’s entire mark. That Applicant’s mark incorporates Opposer’s mark increases the similarity between the two. *See China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant’s mark CHI PLUS is similar to opposer’s mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Mem., TN, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant’s mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL and griffin design for fabrics is likely to cause confusion with WEST POINT for woolen piece goods); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6-7 (TTAB 2019) (respondent’s mark ROAD WARRIOR is similar to petitioner’s mark WARRIOR); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant’s mark VANTAGE TITAN for

⁶¹ Applicant does not dispute “that a portion of Applicant’s Mark is similar to Opposer’s marks.” Applicant’s Brief, p. 7 (14 TTABVUE 8).

medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus).

Applicant argues that “although the first two words in Applicant’s mark sound identical to the entirety of Opposer’s mark, the additional words and syllables ‘& Queens’ used in Applicant’s mark creates a phonetic difference” that connotes Applicant’s mark.⁶² We disagree. Here, Applicant’s mark KULTURE KINGS & QUEENS looks, sounds, and conveys the impression of being a line extension of Opposer’s CULTURE KINGS. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“Because of the alliteration with SQUIRT, SQUAD is an apt choice to combine with SQUIRT to suggest a line or group of toys from the same source as SQUIRT balloons. Thus, the marks do not create different commercial impressions.”); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN “more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices”); *Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”).

We find that Applicant’s mark KULTURE KINGS & QUEENS is similar to Opposer’s mark CULTURE KINGS in their entireties as to appearance, sound, meaning and commercial impression.

⁶² Applicant’s Brief, p. 8 (14 TTABVUE 9).

3. Similarity or dissimilarity and nature of the goods and services⁶³

In determining whether the goods and services are related, it is not necessary that the goods and services of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming there is a likelihood of confusion establish that the goods and services are related in some manner or that conditions and activities surrounding marketing of these goods and services are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs.*, 101 USPQ2d at 1722; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010).

The issue is not whether purchasers would confuse the parties' goods or services, but rather whether there is a likelihood of confusion as to the source of these goods or services. *See Recot*, 54 USPQ2d at 1898 (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (“the test is not whether consumers would be likely to confuse these goods, but rather whether they would be

⁶³ Because Opposer did not prove its priority for its mark CULTURE KINGS in connection with entertainment services, we do not include those services in our likelihood of confusion analysis.

likely to be confused as to their source.”); *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989).

Applicant is seeking to register KULTURE KINGS & QUEENS for, inter alia, “entertainment services in the nature of development, creation, production, distribution, and post-production of documentaries about the history and ongoing impact of urban and hip hop culture.” Opposer markets and advertises its goods and services in connection with streetwear and hip-hop based goods.⁶⁴

10. The CULTURE KINGS Marks have been used in the US commerce in connection with the sale and promotion of apparel, streetwear, and accessories relating to music, sport, and fashion since at least 2014.⁶⁵

41. The CULTURE KINGS Marks are advertised along with goods and services highlighting urban and hip hop culture. Music is one of the pillars on which the CULTURE KINGS brand was built, and is frequently the subject of advertising material. Rappers and hip hop music artists are known to wear CULTURE KINGS clothing and visit the stores, and these visits are uploaded to the CULTURE KINGS YouTube channel.⁶⁶

For example, Opposer posts a blog displaying its C CULTURE KINGS and design mark featuring music, style and sport.⁶⁷

⁶⁴ Beard Testimony Decl. ¶¶ 13 and 16 (9 TTABVUE 11) (through its online presence, Opposer has become known for streetwear that blends fashion, sport and music).

⁶⁵ Beard Testimony Decl. 10 (9 TTABVUE 10).

⁶⁶ Beard Testimony Decl. ¶ 41 (9 TTABVUE 19).

⁶⁷ Beard Testimony Decl. ¶ 18 (9 TTABVUE 12 and 168-171). Opposer posted the blog introduced as an exhibit April 16, 2019, prior to Applicant’s November 25, 2020 filing date. The menu posts links to “News drops,” “Style,” “News,” “Events,” “In-store appearances,” “Music,” and “Sports.”

The stores are popular with young, cool, and/or streetwear-obsessed celebrities, with the likes of Big Sean, Snoop Dogg, 2 Chainz, Migos, Drake, Justin Bieber, Shaquille O'Neal, and Cristiano Ronaldo making appearances. Videos of the appearances are often posted on YouTube and other social media so fans from around the world can experience the store visits and see what their favorite athletes and musicians purchased. [Opposer's] exceptional in-store experience has led to a global reputation for excellence as a streetwear brand, and immense online global sales have followed that reputation.⁶⁸

Opposer's YouTube channel features footage from in-store celebrity appearances by the likes of Big Sean, Lil Yachty, YG and Ty Dolla Sign, Migos, Amine, Mac Miller, Nas, Steve Aoki, and Playboi Carti.⁶⁹ In the same vein, Opposer has marketing deals with musicians and rappers such as Ice Cube, The Notorious B.I.G., Wu Tang Clan, Justin Bieber, and Migos.⁷⁰

Opposer's broadly worded identifications of goods for jewelry, bags, including purses and wallets, and clothing encompass such products directed to consumers interested in streetwear, hip hop, and urban culture. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (applying the principle that "registration encompasses all goods or services of the type described"); *Monster Energy v. Lo*, 2023 USPQ2d 87, at *15-16 (TTAB 2023); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

⁶⁸ Beard Testimony Decl. ¶ 25 (9 TTABVUE 14).

⁶⁹ Beard Testimony Decl. ¶ 26 (9 TTABVUE 14-15).

⁷⁰ Beard Testimony Decl. ¶ 27 (9 TTABVUE 15).

This is because we do not read limitations into the descriptions of goods. *i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 216 USPQ at 940 (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *47 (TTAB 2020); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). Therefore, we presume that Opposer’s products encompass include all types of clothing, jewelry, bags, wallets and purses, including those directed to consumers who appreciate streetwear, urban, and hip hop culture. In this regard, Simon Beard testified that Opposer’s CULTURE KINGS brand “is synonymous with streetwear that blends fashion, sport, and music.”⁷¹

No presumptions are necessary to create a nexus to streetwear, urban and hip hop culture in connection with Opposer’s retail store, mail, telephone order online sales services featuring streetwear clothing and accessories because the services expressly include streetwear.

Consumers familiar with Opposer’s streetwear style jewelry, bags, including luggage, purses and wallets, clothing, sports equipment, and retail sales services featuring streetwear clothing and accessories encountering Applicant’s “entertainment services in the nature of development, creation, production,

⁷¹ Beard Testimony Decl. ¶ 16 (9 TTABVUE 12).

distribution, and post-production of documentaries about the history and ongoing impact of urban and hip hop culture” are likely to mistakenly believe that those goods and services emanate from the same source.

Applicant argues that the goods and services are not related, in part, because they are in different International Classes.⁷² However, the classification of goods and services is for the convenience of the USPTO and does not limit or extend the applicant’s or registrant’s rights. Section 30 of the Trademark Act, 15 U.S.C. § 1112. *See also Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (“[C]lassification is wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification.”); *INB Nat’l Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1587 (TTAB 1992) (“[T]he system of dividing goods [and services] into classes is purely a manner of convenience[,] and ... a determination on the question of likelihood of confusion cannot be restricted by the artificial boundary created by classification.”).

Applicant also argues that because he intends to use his mark “specifically and primarily in connection with the development, creation, production, distribution, and post-production of documentaries and films” and because Opposer’s uses its mark in connection with the sale of apparel, streetwear, and accessories,” the parties’ goods and services are not related.⁷³ There are two problems with Applicant’s argument.

⁷² Applicant’s Brief, p. 18 (14 TTABVUE 19).

⁷³ Applicant’s Brief, p. 18 (14 TTABVUE 19).

First, Applicant's description of services includes the limitation "about the history and ongoing impact of urban and hip hop culture." Second, urban and hip hop culture is associated with streetwear, music and fashion. Accordingly, when consumers encounter Applicant's mark KULTURE KINGS & QUEENS used in connection with documentaries in the field of urban and hip hop culture, they may mistakenly believe that it is somehow associated with Opposer's CULTURE KINGS goods and services featuring streetwear.

4. Established, likely-to-continue channels of trade and classes of consumers

Because there are no limitations or restrictions in Opposer's descriptions of goods, we presume that Opposer offers them in all channels of trade and to all classes of consumers normal for such goods. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). This includes the consumers Opposer identified in the Beard declaration:

The goods and services sold under the CULTURE KINGS Marks are mainly targeted towards and purchased by males and females aged 18-44, a group that includes consumers of all sophistication levels. These consumers are the typical consumers of the goods and services, including streetwear and hip-hop based goods and entertainment services, identified in [Opposer's] registrations and applications asserted in this proceeding.⁷⁴

⁷⁴ Beard Testimony Decl. ¶ 13 (9 TTABVUE 11).

As noted above, Opposer's retail store, mail, telephone order online sales services featuring streetwear and accessories expressly include streetwear.

Applicant's "entertainment services in the nature of development, creation, production, distribution, and post-production of documentaries about the history and ongoing impact of urban and hip hop culture" will be offered to the same consumers purchasing Opposer's streetwear and accessories, as well as Opposer's retail sales services featuring streetwear and accessories.

We find that this factor weighs in favor of a likelihood of confusion.

5. Conditions under which sales are made

Without any supporting testimony or evidence, Applicant asserts that viewers of his films will exercise a high degree of care.

Streaming services and distribution companies that engage in the distribution of documentaries and films typically have an extensive process before they select films to distribute and license. Furthermore, the consuming public generally does some level of research before watching a film, even if just viewing the film's short trailer to get a general idea of what the film is about. This is evident of some level of customary sophistication of the ordinary consumer.⁷⁵

There are a two problems with Applicant's position. First, "Attorney argument is no substitute for evidence." *Cai*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

Second, even if some members of the viewing public exercise a high degree of care selecting films and documentaries for viewing, not all consumers will be so

⁷⁵ Applicant's Brief, pp. 21-22 (14 TTABVUE 22-23).

discerning. Board precedent requires we consider the “least sophisticated consumer in the class.” *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”). *See also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

We find that the conditions under which sales are made is a neutral factor.

6. Conclusion

Because the marks are similar, the goods and services are related, and they are offered to the same classes of consumers, we find that Applicant’s mark KULTURE KINGS & QUEENS for, inter alia, “entertainment services in the nature of development, creation, production, distribution, and post-production of documentaries about the history and ongoing impact of urban and hip hop culture; entertainment services in the nature of production of documentaries about the history and ongoing impact of urban and hip hop culture” is likely to cause confusion with Opposer’s mark CULTURE KINGS for streetwear jewelry, bags, including purses and wallets, clothing, and retail sales services featuring streetwear clothing and accessories.

Decision: We sustain the opposition to register Applicant’s mark KULTURE KINGS & QUEENS under Section 2(d) of the Trademark Act and registration is refused.